

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

with affidavit

74-2537

To be argued by
WILLIAM S. BRANDT

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-2537

ANTHONY B. CATALDO and ADA W. CATALDO,
Plaintiffs-Appellants,

—v.—

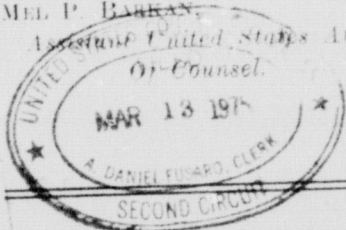
UNITED STATES OF AMERICA,
Defendant-Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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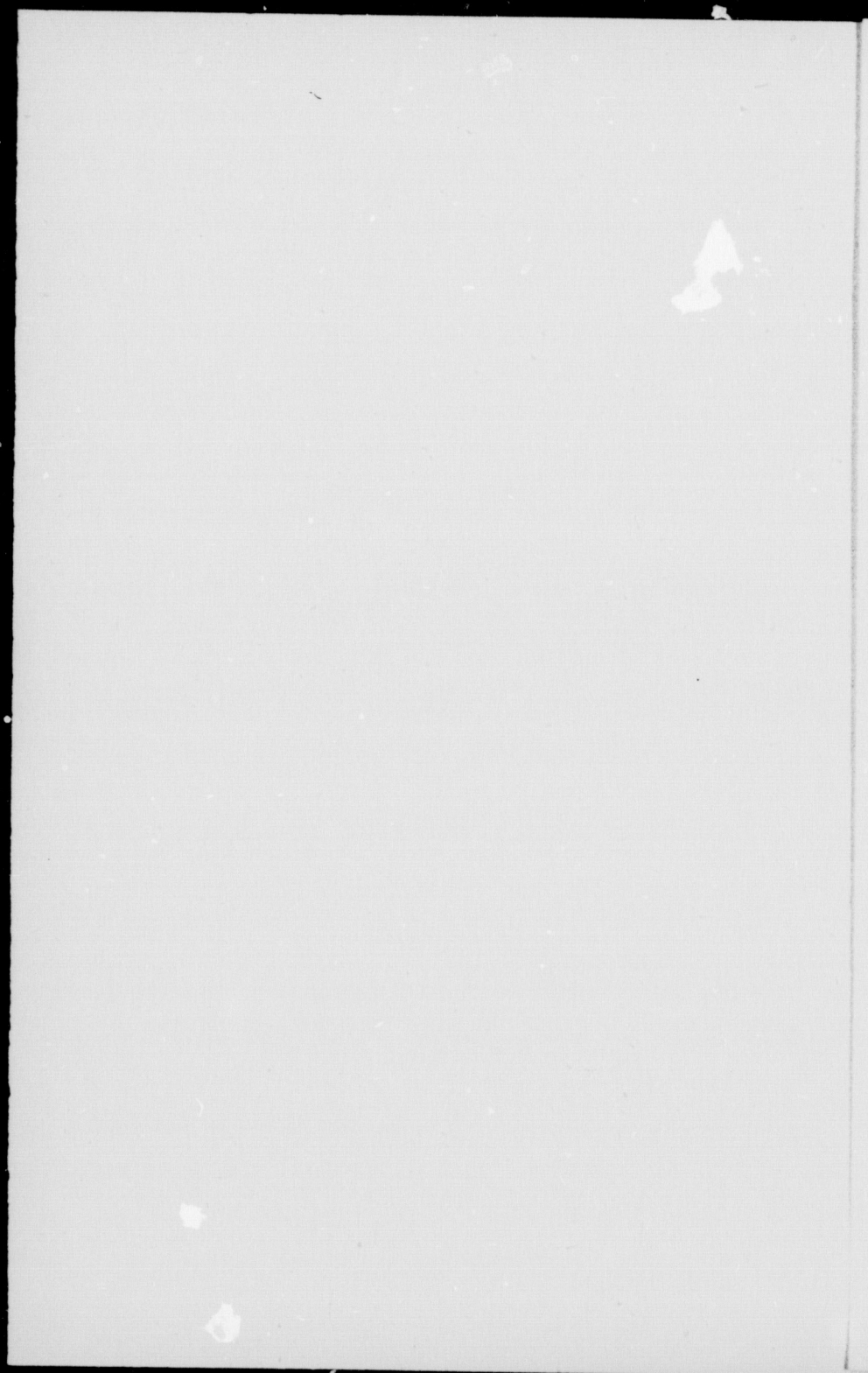


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2537

ANTHONY B. CATALDO and ADA W. CATALDO,
Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from an order of the Honorable Richard H. Levet, United States District Judge, dated October 16, 1974, denying appellant Anthony B. Cataldo's motion to vacate or resettle a contempt order filed with the District Court on May 18, 1973.

Issues Presented

- 1—Does this Court have jurisdiction to hear this appeal?
- 2—Did the District Court abuse its discretion in denying appellant's Rule 60(b), F.R.Civ.P. motion?
- 3—Did the District Court properly hold the appellant in contempt?

Procedural History

a. The First Appeal

The appellant, Anthony B. Cataldo ("Cataldo"), an attorney appearing pro se, was held in contempt of court for his conduct during the course of a civil bench trial for a \$2,200 tax refund held on May 10, 11 and 14, 1973. Cataldo was ordered to pay a \$50 fine. Under cover of a letter to Judge Levet dated May 16, 1973, Cataldo paid the \$50.00 fine (2a).^{*} Thereafter, the Certificate of Contempt, dated May 18, 1973, was filed on the civil docket by the Clerk of the District Court on May 18, 1973 (4a, 3ga).^{**}

On June 27, 1973, Cataldo submitted proposed findings of fact and conclusions of law which did not mention the contempt. However, Cataldo's Post Trial Memorandum did discuss contempt (at pp. 52-59) and treated it as criminal rather than civil in nature.

On June 29, 1973, Judge Levet issued an opinion, findings of fact and conclusions of law concerning the merits of the tax case. On July 12, 1973, a proposed Judgment was submitted by the United States. On July 9, 1973, a counter judgment was submitted by Cataldo. None of these three documents discussed the issue of Cataldo's contempt.

On July 13, 1973, Judge Levet signed a judgment which did not mention Cataldo's contempt and dealt solely with the dismissal of the civil complaint. The judgment was entered on July 17, 1973.

^{*} References to the Appellant's Appendix will be indicated by the page number followed by the letter "a".

Cataldo is inaccurate when he states that the \$50.00 fine was paid to the defendant, i.e., the United States (Appellants' Brief, p. 13). Cataldo clearly stated that the \$50 check was "to the order of the court." (2a).

^{**} References to the Government's Appendix will be indicated by the page number followed by the letters "ga".

On September 17, 1973, Cataldo filed a notice of appeal "from the final judgment dismissing this action entered on the 17th day of July, 1973." Therefore, no appeal was taken from the May 18, 1973 contempt order. Cataldo admits that he was aware of the issue of filing a separate notice of appeal from the contempt order. (6-7ga)

Cataldo briefed the issue of contempt when he appealed the dismissal of his tax case, apparently treating it as criminal contempt. Appellant's Brief in 73-2602, p. 54-55.*

The Government's brief also treated the contempt as criminal. Appellee's Brief in 73-2602, pp. 8, 32. In fact the Government raised the issue that Cataldo failed to file a separate notice of appeal from the contempt order. Appellee's Brief in 73-2602, p. 2. This point was not contested in Cataldo's reply brief.

However, after oral argument, in a letter dated June 13, 1974, addressed to the Clerk of the Court of Appeals, with carbon copies to the members of the panel hearing the argument, Cataldo raised the very same issues he now raises. Cataldo stated in that letter "the contempt here does appear to be a criminal contempt." However, he alleged prejudice resulting from the labeling of the contempt order as civil contempt (6-7ga).

On June 25, 1974, the Court of Appeals, necessarily being aware of the fact that the contempt order was entered upon the civil docket (3ga), affirmed the District Court on the issue of tax liability. *Cataldo v. United States*, 501 F.2d 396 (2d Cir. 1974). As far as the contempt order was concerned the Court held:

"In the course of the proceedings in the District Court, appellant Anthony B. Cataldo was summoned

* The number 73-2602 refers to the docket number of Cataldo's prior appeal. The decision is reported at 501 F.2d 396 (2d Cir. 1974).

to show cause why he should not be held in contempt.¹ A judgment so holding was filed on May 18, 1973. Although appellants proffer various arguments attacking the validity of this latter judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its review."

1. "Although Cataldo was summoned to show cause why he should not be held for civil contempt, both appellants and appellee now treat the contempt judgment as if it were criminal in nature and, indeed, it would seem likely in light of the circumstances surrounding it that it was the judge's intent that it should be so construed." *Id.*

b. The Second Appeal

Thereafter, Cataldo returned to the District Court. Pursuant to a notice of motion dated October 1, 1974, Cataldo requested the District Court to remit the contempt penalty (12a). In his supporting affidavit Cataldo also sought to vacate the order of contempt (14a), or "resettle" the order (17a). Basically, the grounds for the relief were first an argument to the merits of the contempt, and second that he had lost his right to appeal the contempt order of May 18, 1973. The Government opposed the application on the grounds of res judicata (20a).

In response to the Government claim of res judicata (20a), Cataldo claimed that Rule 60(b) of the F. R. Civ. Proc. permitted his motion even after the lapse of one year* (25a).

In a memorandum order filed October 17, 1974, Judge Levett denied Cataldo's motion (22a). On November 10,

* Rule 60(b) provides in pertinent part:

"The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

1974, Cataldo filed a notice of appeal from Judge Levet's order (27a).*

On November 22, 1974, the Government moved in the district court to dismiss this appeal pursuant to Rule 7, F.R.App.P., for failure to post security for payment of appellate costs (8ga). In response, Cataldo stated:

"[t]he instant appeal is not a Civil Appeal. It is a criminal appeal." (13ga)

Therefore, as a criminal appeal, Cataldo argued that no bond was required. Based upon this representation, the Government withdrew its motion. (15ga).

Thereafter, the Government moved in this Court to dismiss the appeal as not being timely filed (21ga). As Cataldo represented that this was a criminal appeal, the notice of appeal had to be filed within 10 days after the entry of judgment. Rule 4(b), F.R.App.P. Cataldo had failed to file a notice of appeal within that time. The panel which heard that motion to dismiss on February 11, 1975, referred this motion to the panel which will hear the instant appeal.

* On November 6, 1974, Cataldo commenced a civil action in Queens County Supreme Court against the two Assistant United States Attorneys who handled the previous appeal. Also included as a defendant is the Internal Revenue Service Agent who testified at the trial. Cataldo, seeking \$100,000 in damages, charges the defendants with suborning perjury, submitting false evidence and conspiracy to defraud the court. This action was removed to the United States District Court for the Eastern District of New York.

POINT I

This Court Lacks Jurisdiction To Hear This Appeal.

A. This appeal is barred by the doctrine of law of the case and/or res judicata

The order which is the basis of this appeal is a refusal by the District Court to review the merits of Cataldo's contempt citation or resettle the contempt order. On June 25, 1974, this Court ruled that it lacked jurisdiction to hear an appeal on the merits of the contempt order because Cataldo had failed to file a separate notice of appeal from the contempt citation filed May 18, 1973. *Cataldo v. United States*, 501 F.2d 396 (2d Cir. 1974). Pursuant to Cataldo's June 14, 1973 letter to this Court (5ga), Cataldo proffered the same arguments he raises now concerning alleged prejudice resulting from the labelling of the contempt citation as civil. The Court ignored this unpersuasive argument when it was first made. It should be considered no more convincing today.

Therefore, the issue of the appealability of Cataldo's contempt citation has been previously reviewed and decided by this Court. It is now the law of the case and Cataldo can not relitigate that issue. *Cf.*, *Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 231 n.2 (5th Cir. 1972); *Frey v. Frankel*, 443 F.2d 1240, 1244-45 (10th Cir. 1971); *Alabama Power Co. v. Federal Power Comm'n*, 128 F.2d 280, 285 (D.C. Cir.), *cert. denied*, 317 U.S. 652 (1942).

As Professor Moore has stated the issue:

"When, therefore, a federal court enunciates a rule of law to be applied in the case at bar . . . it establishes the law which other courts owing obedience to it *must*, and which it itself will, normally apply to the same issues in subsequent proceedings in that case." 1B Moore, *Federal Practice*, ¶ 0.404[1], pp. 402-403 (1974 ed.) (emphasis in original).

If Cataldo had commenced a separate action to set aside the contempt order, clearly such action would be a sham. *Financial Services, Inc. v. Ferrandina*, 474 F.2d 743 (2d Cir. 1973). Further, such an action would be barred by the doctrine of res judicata. Res judicata applies to jurisdictional decisions, such as the non-reviewability of the contempt order, as well as decisions on the merits. See *Ripperger v. A.C. Allyn & Co., Inc.*, 113 F.2d 332 (2d Cir. 1940), *cert. denied*, 311 U.S. 695 (1941); *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940). The merits of the appealability of Judge Levet's contempt order have been decided. There is no reason why Cataldo should not be barred under the principle of res judicata as well as by the doctrine of law of the case.

Cataldo raises a new argument concerning the failure of the May 18, 1973 contempt order to be entered on the criminal as opposed to civil docket (29ga). The doctrine of res judicata bars all claims that were made or could have been made on appeal. Thus, although this precise argument was not made in Cataldo's first argument, it cannot be made now. *Boruski v. United States Government*, 493 F.2d 301, 304 (2d Cir. 1974), *appeal dismissed*, 95 Sup. Ct. 20 (1974); see *Wolcott v. Hutchins*, 245 F.Supp. 578, 581 (S.D.N.Y. 1965), *aff'd*, 365 F.2d 833 (2d Cir. 1966).

B. This appeal from Judge Levet's order of October 17, 1974 was not timely

In order to try to avoid the dismissal of his appeal herein, for failure to file security for payment of appellate costs (8ga), Cataldo represented to the District Court:

"[the] instant appeal is not a Civil Appeal. It is a criminal appeal." (13ga)

If Cataldo has correctly described this appeal as criminal, a notice of appeal was not filed within 10 days after Judge Levet entered his October 17, 1974 order and, thus, the Court is without jurisdiction. Rule 4(b), F.R.App.P.

Cataldo argues in his January 14, 1975 affidavit (29ga) that insofar as neither the original contempt citation nor Judge Levet's October 17, 1974 memorandum were filed on the criminal docket, the time to appeal has not yet begun to run. This is a hyper-technical argument since the District Court's label of the nature of the contempt is not controlling, *Southern Ry. Co. v. Lanham*, 403 F.2d 119, 124-126 (5th Cir. 1969),* and since Cataldo was fully aware that criminal contempt was the charge.

Since summary contempt proceedings are "sui generis", *In re Union Nacional de Trabajadores*, 502 F.2d 113, 120 (1st Cir. 1974), we do not believe that it is even required to enter the contempt certificate on the criminal docket as opposed to the civil docket where, as here, the criminal contempt arose during the course of a civil trial. A summary criminal contempt in the course of a civil trial may not be a "criminal proceeding" within the meaning of Rule 55, F.R. Crim. P. Therefore, it is questionable as to whether it is ever required to enter the contempt order on the criminal docket.

It would appear that if it was error at all, the entry of the order upon the civil docket was merely a harmless clerical error. *Cf. Fluro Electric Corp. v. Brandford Associates*, 489 F.2d 320 (2d Cir. 1973); *Hamilton v. Stillwell Van & Storage Co.*, 343 F.2d 453 (3d Cir. 1965); *O'Tell v. New York, New Haven & Hartford R. Co.*, 236 F.2d 472 (2d Cir. 1956); *First National Bank v. National Airlines, Inc.*, 167 F. Supp. 167 (S.D.N.Y. 1958); *Anderson v. Brady*, 6 F.R.D. 587 (E.D. Ky. 1947); *see generally*, 6A Moore, Federal Practice ¶¶ 60.05 *et seq.*, pp. 4053-4073 (1974 ed.).**

* Therein, the appellant appealed immediately from a contempt citation which the District Court labeled as civil, and which was found by the appellate court to be criminal contempt. The appellant, in spite of the District Court's label, filed a notice of appeal within ten days as required by the Rules. *Id.*, 126 n.1.

** This Court previously noted that not only did Cataldo and the Government regard the order as one for criminal contempt but also that it was likely "the judge's *intent* that it should be so construed" (501 F.2d 396 n.1; emphasis supplied).

Cataldo was aware that the order was of a criminal nature and aware of at least the possibility that it was final and immediately appealable (6-7ga). Regardless of whether the contempt order was entered upon the civil or criminal docket, Cataldo made neither a timely effort to have the Clerk correct its entry nor an effort to protect himself by filing a timely notice of appeal.*

Having known of the issue from the outset, Cataldo can hardly complain of any prejudice from the original characterization of the contempt order. *Cf. United States v. United Mine Workers*, 330 U.S. 258, 296-301 (1947). Either Cataldo never intended to appeal his contempt fine of \$50.00 until the last moment, or he just plain forgot to file a separate notice of appeal.** Under these circumstances it is hard to imagine how Cataldo can claim prejudice by the entry of the order on the "civil" as opposed to "criminal" docket. What occurred is no more than a harmless clerical error with his present argument being no more than an afterthought which should have been raised prior to or during his first appeal.

This Court has recently reaffirmed the principle that the requirements of Rule 4, F.R.App.P., are "mandatory and jurisdictional." *Stirling v. Chemical Bank*, Docket No. 75-7006 (2d Cir. February 11, 1975). In this appeal Cataldo has failed to show any of the unusual circumstances which would raise any of the issues present in *Stirling*. *Id.* The simple fact is that a contempt citation was filed from which

* The re-entry of an order to correct a clerical error does not start anew the time within which to appeal. *Cf. United States v. 1,431.80 Acres of Land, etc.*, 466 F.2d 820 (8th Cir. 1972); *Albers v. Gant*, 435 F.2d 146 (5th Cir. 1970).

** Even assuming *arguendo* that Rule 4(a), F.R.App.P., governed the first appeal (since the contempt proceeding was ancillary to the civil action), Cataldo waived his right of appeal by failing to lodge an appeal within sixty days of the entry of the contempt certificate.

an appeal should have been taken and wasn't; an attack on the contempt order filed in May 1973 is now improper. See *United States v. Secor*, 476 F.2d 766 (2d Cir. 1973); *Oriel v. Russel*, 278 U.S. 358 (1929); cf., *United States v. Mulcahy*, 169 F.2d 94 (2d Cir. 1948), *cert. denied*, 337 U.S. 956 (1949).

POINT II

The District Court Improperly Denied Cataldo's Rule 60(b) Motion

Assuming *arguendo* that this Court finds it has jurisdiction to hear this appeal, a very narrow issue is before it. Cataldo moved in the District Court pursuant to Rule 60(b) of the F.R.Civ.P. to modify the contempt order.*

Upon review of a Rule 60(b) motion the appellate court does not review the underlying judgment sought to be modified—herein the contempt order. *Hines v. Seaboard Airline Railroad Co.*, 341 F.2d 229 (2d Cir. 1965); *Wagner v. United States*, 316 F.2d 871 (2d Cir. 1963). This Court is limited to a consideration of whether the district court abused its discretion.

Rule 60(b) can not be used as a substitute for appeal.

“ . . . accordingly the district court, in the exercise of a sound discretion, may deny a motion for relief

* Although the motion papers did not indicate the jurisdictional basis, pursuant to a letter dated October 14, 1974, Cataldo states that this motion was pursuant to Rule 60. (25a). Even if the papers were mislabeled, this Court may treat Cataldo's motion as one pursuant to Rule 60(b). 7 Moore, *Federal Practice*, ¶ 60.27[1], p. 350 (1974 ed.)

We note that Cataldo stated that he was making a motion pursuant to the *civil* rules to Judge Levet, and yet in his affidavit in opposition to the requirement of filing a bond he stated that this was a *criminal* appeal. Obviously, Mr. Cataldo thinks that he can have the advantages of both sets of rules.

that is based on a ground that was open to the movant on appeal." 7 Moore, Federal Practice, ¶ 60.30[2], p. 424 (1974 ed.).

Therefore, the merits of the contempt citation and any argument concerning the docket upon which the order was filed may not now be reviewed as this review was available to Cataldo on his first appeal had he complied with the Rules. *Ripperger v. A.C. Allyn & Co.*, *supra*; *Loucke v. United States*, 21 F.R.D. 305 (S.D.N.Y. 1957).*

In *Perrin v. Aluminum Co. of America*, 197 F.2d 254 (9th Cir. 1952) the appellant's claim was dismissed by the district court. An appeal was thereafter dismissed for lack of jurisdiction as the notice of appeal was not timely filed. The appellants then went back to the district court and moved pursuant to Rule 60(b), F.R.Civ.P. to vacate the Court's order of dismissal. The district court denied the motion, from which a timely appeal was taken. The Court of Appeals, after stating that its review was limited to abuse of discretion by the district court stated:

"Appellants had opportunity to obtain appellate review of the very rulings of which they now complain but failed to take advantage of the opportunity within the time prescribed by Rule 73(a) [now Rule 4, F.R.App.P.]. Having in consequence of their own lack of diligence been turned away at the front door they now seek entry at the rear. Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal." *Id.* at 255.

* Cataldo did raise the issue on the first appeal concerning the prejudice incurred by the incorrect label of the contempt order (6-7ga).

A back alley entry to this Court is exactly what Cataldo is seeking. Cataldo seeks to litigate the merits of the contempt citation after this Court has previously ruled that it lacked jurisdiction to hear it. Moreover, the issue of the incorrect labelling of the contempt citation and the alleged prejudice resulting therefrom was presented to that panel which held that it lacked jurisdiction to hear the appeal (6-7ga).

The District Court did not abuse its discretion by denying Cataldo's motion since Cataldo was aware of the jurisdictional risks of his failure to separately appeal and since the Court of Appeals already had ruled that it did not have jurisdiction because Cataldo had not timely filed a separate notice of appeal. Indeed, Judge Levet was bound by law of the case to deny the motion.

POINT III

The Repeated Refusal of the Attorney-Taxpayer to Abide By The Directions of The Court Constituted Contempt.

The record to the trial in this case is replete with the obstinate and disruptive behavior of Cataldo, who represented himself pro se and his wife. The district court, on several occasions, admonished counsel not to interrupt when it was speaking and not to persist in arguing after rulings had been made (A89-90, A94, A117, A121, A137-A138, A143).^{*} Such basic rules are not only conducive to an orderly trial, they are essential to insure that the proceedings do not degenerate into a shouting match. Because of Cataldo's refusal to pay heed to the Court's directives he was held in contempt and fined \$50.00 (A150).

^{*} The references in this section are to the original appendix on appeal in *Cataldo v. United States*, 501 F.2d 396 (2d Cir. 1974), Docket No. 73-2602.

This Court has recognized that the contempt sanction is available to prevent abuses which disrupt the orderly conduct of a trial. *United States v. Galante*, 298 F.2d 72 (2d Cir. 1962) (persistence of a defendant in addressing the Court). This is true even when the contemptuous conduct is that of a lawyer done in the course of representing his client. *United States v. Schiffer*, 351 F.2d 91, 94 (6th Cir. 1965), *cert. denied*, 384 U.S. 1003 (1966). Although the mere transgression of an order governing trial procedure is usually insufficient to sustain a contempt conviction, a persistent disregard for the Court's authority that the attorney could have avoided through a reasonable and good faith effort does constitute contempt. *Weiss v. Burr*, 484 F.2d 973, 981 (9th Cir. 1973). Since it can be said that the attorney's conduct here "actually obstructed the district judge in the performance of judicial duty", then the contempt order was warranted. *In re McConnell*, 370 U.S. 230, 234 (1962).

The insistence of Cataldo in arguing every minor point after adverse rulings had been made resulted in the prolongation of trial. Further, Cataldo's frequent interruptions made it almost impossible for the Court to hear testimony and make rulings in an orderly manner on the innumerable claims for deductions. Considering the many warnings that had been given, the summary finding of contempt was warranted.

It is clear and this Court has so found that what was involved below was a summary criminal contempt pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure. The Rule provides that the judge certify the contemptuous conduct which was committed in his presence. This procedure was followed. *But cf., In re Williams* Docket No. 73-2697 (2d Cir. January 10, 1975).^{*} Although there is no

^{*} On the merits, the *Williams* case is distinguishable as Williams was a lay witness who was perhaps incapable of understanding and therefore complying with the Court's directives. Mr. Cataldo however, well understood the court's directions and admonitions which he chose to ignore.

right to be heard when the Court proceeds by summary contempt, *Weiss v. Burr*, *supra*, the Court invited Cataldo to show why he should not be fined (A137) and whether there was any reason for this fine to be remitted (A355-A356, A10-A11). The fine of fifty dollars is hardly excessive. See *In re Gates*, 478 F.2d 998 (D.C. Cir. 1973) (attorney fined fifty dollars for delaying the start of a trial by being otherwise occupied before a Magistrate).

CONCLUSION

This appeal should be dismissed for lack of jurisdiction and/or the judgment of the district court should be affirmed.

Dated: March 13, 1975
New York, New York

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
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Attorney for Defendant-Appellee,
United States of America.*

WILLIAM S. BRANDT,
MEL P. BARKAN,
*Assistant United States Attorneys,
Of Counsel.*

For
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AFFIDAVIT OF MAILING

te of New York) ss
nty of New York)

Pauline Troia,
being duly sworn,
poses and says that she is employed in the Office of the
ted States Attorney for the Southern District of New York.

That on the 13th day of
2 copies
March 1975 s he served ~~copy~~ of the within
brief and appendix (14 Per P.T.)

placing the same in a properly postpaid franked envelope
ressed:

Anthony B. Cataldo, Esq.,
111 Broadway
New York, NY 10006

And deponent further says
sealed the said envelope and placed the same in the
chute drop for mailing in the United States Courthouse,
y Square, Borough of Manhattan, City of New York.

Pauline Troia

n to before me this

n day of March 1975

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975